# United States Court of Appeals for the Second Circuit



# BRIEF FOR APPELLEE

## 76-6191

## United States Court of Appeals

For the Second Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee-Appellant.

and

JOSEPHINE MeGEE, Plaintiff-Intervenor-Appellee-Appellant

against

KALLIR, PHILIPS, ROSS, INCORPORATED, Defendant-Appellant-Appellee.

BRIEF ON BEHALF OF PLAINTIFF-INTERVENOR-APPELLEE-APPELLANT, JOSEPHINE McGEE

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#### UNITED STATES COURT OF APPEALS

#### FOR THE SECOND CIRCUIT

Docket No. 76-6191

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee-Appellant,

- and -

JOSEPHINE MCGEE,

Plaintiff-Intervenor-Appellee-Appellant,

- against -

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant-Appellant-Appellee.

BRIEF ON BEHALF OF PLAINTIFF-INTERVENOR-APPELLEE-APPELLANT JOSEPHINE MCGEE

> RESTATEMENT OF ISSUES PRESENTED FOR REVIEW BY APPELLANT.

- Whether the district court was clearly erroneous as to the following findings of fact:
  - a. that McGee was not discharged for a sufficient business justification but was discharged by appellant in retaliation for her filing of a charge of sex discrimination;
  - b. that McGee was not discharged for her disruptive behavior, but was discharged by appellant for her filing of a charge of sex discrimination.
- Whether the admission by appellant Kallir, Philips, Ross, Inc. that McGee was discharged partly for the reason that she advised her fellow female employees of their right to

file sex discrimination charges against appellant mandates a finding of retaliatory conduct in violation of \$ 704 (a) of the Act.

- 3. Whether the evidence warrants a finding that the appellant failed to meet its burden that a deduction should be made from McGee's back pay award for amounts earnable with reasonable diligence.
- 4. Whether the award of back pay to McGee was erroneously computed in the following respects:
  - a. no award should be allowed for back pay subsequent to September, 1975;
  - no consideration by the magistrate was given to the question of certain loans;
  - c. no award should be allowed for the eight month period between the magistrate's hearing and the date of judgment
- 5. Whether the district court abused its discretion by awarding to McGee a year's future salary without continuing its jurisdiction in supervision thereof.

ISSUES PRESENTED FOR
REVIEW BY APPELLEE - APPELLANT
Mc GEE

- 1. Whether the district court abused its discretion in failing to order reinstatement of McGee to her employment as a senior account executive with the appellant KPR.
- Whether the benefits received by appellee McGee from the New York State Unemployment Insurance Benefit program were properly deducted from the award of back pay.

#### PRELIMINARY STATEMENT

The opinion, findings of fact and conclusions of law of the Hon, Edward Weinfeld\* filed on July 31, 1975 found that appellant Kallir, Philips, Ross, Inc. (KPR) had placed intervenor appellee JOSEPHINE McGEE (McGee) on an involuntary leave of absence and then discharged her in retaliation for her filing of a charge of sex discrimination with the New York City Commission on Human Right (N Y C C H R) which constituted retaliatory conduct in violation of \$704 (a) of the Act, 42 U.S.C. \$2000e - 3 (a) (1970). Thereafter Judge Weinfeld rendered an opinion filed October 4, 1976 finding and awarding damages for McGee's back pay from the date of the discharge including increases she would have received within that period from KPR.\*\*

#### PRE-TRIAL PROCEED INGS

Although these were several pre-trial motions, including a motion for a preliminary injunction, appellant refers only to motion by counsel for McGee to withdraw as her attorneys. No issue on appeal in connection with a pre-trial ruling on a motion is presented by either of the parties.

Reported as EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975) and not included in the joint appendix is annexed to this brief.

<sup>\*\*/</sup> The opinion, findings of fact and conclusion of law of the Hon. Edward Weinfeld is reported as EEOC v. Kallir, Philips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976) and appears in the joint appendix at App., A-233

#### TRIAL PROCEED INGS

The trial of this action commenced on June 5, 1975 before Judge Weinfeld sitting without a jury. The case was completed on June 6, 1975. On July 31, 1975 Judge Weinfeld issued a written decision finding that KPR had violated Title VII, EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975).

#### POST-TRIAL PROCEED INGS

On September 30, 1975, Judge Weinfeld referred the matter to the late Magistrate Charles Hartenstine so that a hearing could be held on the amount of back pay, medical expenses, pension and profit-sharing benefits and other damages due McGee, while reserving decision on McGee's request for an order reinstating her at KPR. Such a hearing was held on February 17, 25 and 26, 1976.

After the untimely death of Magistrate Hartenstine in July, 1976, the matter was transferred to Magistrate Sol Schreiber for a report and recommendation by Judge Weinfeld's order of July 30, 1976. On August 31, 1976 Magistrate Schreiber made his determination of damages in a written decision (App., A-217). On October 4, 1976 Judge Weinfeld issued a written decision on damages McGee would be entitled to receive, EEOC v. Kallir, Philips, Ross, Inc., supra (App., A-233).

### STATEMENT OF THE TRIAL EVIDENCE

McGee, at the time of her discharge from KPR was employed as a senior account executive in pharmaceutical advertising. (App., A-20) The Upjohn Company, a pharmaceutical house, was one of the clients of appellant. (App., A-20)\*
McGee was employed by KPR for more than six years. In 1967
McGee began as an administrative assistant and was promoted to positions of increased responsibility with commensurate salary increases. By December 1972, McGee had worked on the Upjohn account for about three years and was promoted to senior account executive under Jay Lilker, a senior vice president of KPR, who was the account supervisor, and John Kallir, President and principal stockholder of KPR, who was the management representative on the account (App., A-17,18-20).

McGee, whose annual salary was then \$18,000, learned in late 1972 that a male senior account executive was paid \$25,000. On December 4, 1972 McGee met with Kallir and then requested in writing that her salary be increased to equal that of her male counterpart. (Plaintiff trial Exhibit 2, App., A-24) Kallir advised McGee that her request would be considered by the executive committee of KPR in April 1973.

<sup>\*/</sup> Appellant prepared and is using the "joint appendix method. References are therefore to the joint appendix and to the entire record where necessary. Reference to portions of the trial transcript not appearing in the joint appendix will be to the page number (eg." Tr.-1). References to portions of the magistrate's hearing transcript not appearing in the joint appendix will be to the page number (eg'Rtr-1)

prior to the sixth anniversary of her employment. (Plaintiff's trial Exhibit 3). McGee shortly thereafter on December 15, 1972 initiated a proceeding by filing a charge of sex discrimination with the New York City Commission on Human Rights (N.Y.C.C.H.R.) (App., A-28). During the course of the next few months McGee participated in the investigation conducted by Arnold Loporena's request that McGee provide the N.Y.C.C.H.R. with an objective job description or evaluation that would support her claim (App., A-30, Tr. 101-102) McGee requested and obtained letters from two Upjohn employees with whom she had frequent contact and who were, therefore, familiar with her duties and performance as a senior account executive. One of these letters was written by Phyllis Korzilius and was dated March 8, 1972 (App., A-12, 157).

On March 13, 1973 the N.Y.C.C.H.R. held a "fact finding conference" in connection with McGee's claim, attended by Commission representatives, McGee, Kallir and representatives of KPR, including its attorney (App., A-31, Tr. 87). During the course of this conference, Morales provided the March 8 Korzilius letter - at a point during the conference when McGee's duties and qualifications were being discussed. App., A-33, Tr. 90). The KPR representatives reacted with emphatic displeasure protesting to the N.Y.C.C.H.R. representative Morales that their client (Upjohn) has been brought into the case and had been informed of McGee's sex discrimination

charge (App., A-61). Though from the time McGee first alleged sex discrimination to Kallir on December 4, 1972, followed by the filing of her complaint on December 15, 1972 and up to her suspension, no KPR official expressed any displeasure because of her charge, or indicated any action would be taken against her (App., A-106.).

On March 26, 1973 John Kallir handed McGee a letter by which McGee was taken off the Upjohn account and placed on an involuntary leave of absence. (App., A-13,36). The letter recited Kallir's reasons for taking these actions as follows:

The protracted nature of our adjourned hearing before the Human Rights Commission; the course you've chosen to follow by involving various individuals, both on the agency's staff and at Upjohn; and your divisive behavior make it increasingly difficult for us to carry on normal day-to-day activities and provide our client with the services they require.

The Executive Committee has therefore decided to relieve you of all responsibilities on the Upjohn account and to ask you not to come to our office until further notice. We presently intend to continue your salary. I think you will agree that it would be preferable not to involve any of our clients in this matter.

On the following day (March 27) Kallir issued a memorandum to his staff informing them of McGee's leave of absence and the reasons for it (App., A-14, 38, 64.) Kallir claimed that McGee had "taken actions which could prove detrimental to our relationship with Upjohn," and that the KPR-Upjohn relationship could not "be undermined through divisiveness or personal rancor."

On April 23, 1973 McGee filed a charge of sex discrimination and retaliation with the EEOC (plaintiff's Exhibit 1, Para. 1, Appendix 1, Tr. 6, 28). On May 15, 1973 the EEOC issued a formal notification to KPR that McGee had filed the charge (plaintiff's Exhibit 1, Para. 5, Appendix V, Tr. 6).

Also on May 15, 1973 John Kallir wrote McGee a letter tersely notifying her that "in view of the circumstances, we have decided to discontinue your checks". The circumstances were not stated. (Plaintiff's trial Exhibit 8, App., A-39, 40). This was, in effect, a notice-of-termination letter. John Kallir testified that "nothing concrete" occurred between March 26 and May 15, that "there was no additional incident." (Tr. 134). Norman Cooper's December 13, 1974 Affidavit (filed in opposition to Plaintiff's request for preliminary relief) admits that McGee was terminated on May 15 because KPR had decided not to finance a war against itself (Cooper Affidavit, App., A- 282)

On March 27, 1973 McGee informed the N.Y.C.C.H.R. of KPR's decision which placed her on an indefinite leave of absence (App., A-37, 62, Tr. 68). On the same day, upon the advice of Lillian Morales (App., A-62), McGee filed a charge of retaliation against KPR with the N.Y.C.C.H.R. (Defendant's Trial Exhibit A and Plaintiff's Trial Exhibit 10, Tr. 69, 101). Morales informed KPR of the retaliation charge over the telephone on March 27 (Tr. 105), and the N.Y.C.C.H.R. Issued a formal notice of the charge on March 30 (Tr. 96).

STATEMENT OF EVIDENCE OF THE MAGISTRATE'S HEARING:

On September 30, 1975 Judge Weinfeld referred the matter of a determination of the amount of back pay and other damages due McGee to the late Magistrate Charles Hartenstine. This hearing was held before the late Magistrate Hartenstine on February 17, 25, 26, 1976.

#### a. EFFORTS TO FIND ALTERNATIVE EMPLOYMENT

McGee's major effort at searching for alternative employment was to attend Pharmaceutical Advertising Club (hereinafter, "PAC") meetings, where she hoped to obtain leads to job openings in her area of specialization - the ethical advertising industry (Rtr. 181). She wanted to be in contact on a regular basis with as many people as possible (Rtr. 275), at least until her membership ran out in late 1974 (Rtr. 181). She testified that she could not afford to renew it (Rtr. 181). McGee did obtain several leads at PAC meetings. She met a Dandy, who suggested that she might be able to edit journal articles in Contemporary Surgery and she obtained a lead to an opening at William, Douglas, McAdams, an ethical advertising agency (Rtr. 221). She was also approached by Chuck Dooley, of a publication entitled Private Practice (Rtr. 221). As McGee has testified, these leads did not result in her obtaining a job. The reasonableness of McGee's reliance on PAC contacts, however, is supported by James Braunworth, KPR's expert witness, who testified that people may find job leads through the PAC

(Rtr. 375) and that people at his agency might spread word of job openings at William, Douglas, McAdams at PAC meetings (Rtr. 421).

McGee made other efforts with the result that she contacted or was contacted by many prospective employers. She failed to find a job at two ethical agencies - William, Douglas, McAdams (Rtr. 153, 380, 382) and Sudler & Hennesey (Rtr. 154) - and at three advertising agencies with ethical departments - J. Walter Thompson (Rtr. 158, 240), L. W. Frolich (Rtr. 170) and Ted Bates & Co. (Rtr. 174).

She attempted to find employment with several audio-visual specialists whose work had some relationship to McGee's background in ethical advertising - World Health Information Services (H.T. 125), Science & Medicine (Rtr. 126), Sidcom (App., A-174, 175), Lavey, Wolf, Swift (Rtr. 152), Health Sciences International (Rtr. 170) and Medicus Communications (Rtr.174).

McGee also attempted to find employment with at least one consumer advertising agency - Norman, Craig, Kummel (Rtr. 159, 241) - even though consumer advertising was outside of her area of experience and expertise.

McGee registered with several employment agencies and, remains registered with these agencies. She registered with Women's Management (Rtr. 66), the New York State Professional Placement Center, Fanning Personnel Agency, Mahoney Personnel

Services, the Benson Personnel Agency (Rtr. 176, App., A-179, 180), the Archer Personnel Agency (Rtr. 176, 205) and Front Desk Personnel (App., A-179). McGee testified that the Fanning agency concentrates in the advertising area (Rtr. 248).

McGee testified that she regularly, at least once a week, read the classified section of the New York <u>Times</u>
(Rtr. 193). From the <u>Times</u> classified section, McGee obtained a lead to an editing job at Rockefeller University, but she was thought to be overqualified (Rtr. 165).

McGee also applied for employment at the Board of Higher Education (Rtr. 164) and the Human Resources Administration (Rtr. 168).

McGee was contacted by Robert Lawless of Einstein Associated as part of his executive search for an Advertising Manager for one of his clients (Rtr. 61, 62).

#### POINT I

McGEE'S CONTACTS WITH UPJOHN TO OBTAIN DOCUMENTARY EVIDENCE IN SUPPORT OF HER CLAIM OF SEX DISCRIMINATION BEFORE THE N.Y.C.C.H.R. WERE NOT PREJUDICIAL TO THE RELATIONSHIP BETWEEN APPELLANT AND THE UPJOHN COMPANY, AND, IN ANY EVENT CONSTITUTED ACTIVITY PROTECTED BY \$704 (a)

Appellant KPR contends that McGee's solicitation of a letter from an employee of the Upjohn Company in connection with her claim of sex discrimination before the N.Y.C.C.H.R. was a sufficient business reason to suspect and then discharge her considering the "pressures and sensitivities inherent in the advertising industry". (Appellant's Brief at p. 12). Neither the evidence at the trial nor the cases sited by appellant support this contention.

a. Appellant did not establish by the evidence that it had sufficient business justification to discharge appellee

According to the testimony of Lillian Morales who spoke over the telephone to John Kallir on March 27, 1973, McGee's contacts with the client was one of two reasons for the decision of KPR's Executive Committee to place McGee on a leave of absence (App., A-63, 64). John Kallir testified that he suspected that some people at Upjohn were aware of McGee's sex discrimination claims and 'were being enlisted by her on her side' (App., A-76). He further testified that he was concerned "that the Upjohn people were being solicited to take sides in an internal agency dispute (App., A-81). He felt that KPR "could not afford to have (McGee) stir up people in

Kalamazoo on behalf of her action against KPR, " (App., A-82), because McGee was allegedly "polarizing certain people" within.

Kallir characterized the March 13, 1973 fact-finding conference held by the CCHR as a "turning point' because at the conference was disclosed the "first concrete evidence... that the Upjohn people knew about "McGee's pending sex-discrimination case (App., A-86). In fact John Kallir admitted that McGee's contacts with Upjohn employees were the "main reason" for KPR's decision to place McGee on a leave of absence.

Norman Cooper's affidavit and testimony shed further light on the significance of McGee's contacts with Upjohn employee's as an underlying reason for KPR's decision to place McGee on a leave of absence on March 23, 1973. In his December 13, 1974 affidavit, Norman Cooper presented only one justification for McGee's leave of absence - the belief by KPR that McGee's contacts with Upjohn employees were jeopardizing KPR's relationship with its client (Cooper affidavit App., A-281) McGee's contacts with Upjohn were described by Cooper (Affidavit, A-281) as follows:

During the months following the filing of (McGee's December 15, 1972 sex-discrimination) charge, (McGee) began to conduct a campaign directed at the employees of the account she was supervising, to obtain letters and statements of commendation as to her proficiency, for the purpose of gathering documentary evidence in support of her filed grievance with the Human Rights Commission of the City of New York.

This description of McGee's conduct is a somewhat accurate portrayal of what actually took place. McGee was advised by Arnold Loperena of the NYCCHR to provide him with whatever evidence she thought might support her sex-discrimination claims (Tr. 101-102). In order to clarify for the NYCCHR McGee's duties as a senior account executive on the Upjohn account, McGee requested a letter from Phyllis Korzilius, an Upjohn employee with whom she had almost daily contact (App., A-45, 46). McGee did this because she felt that she would not be able to get a fair job description from KPR (App., A-47). McGee also solicited a letter from James Penrose, another Upjohn employee with whom McGee had frequent contact, but there is evidence that Penrose was unaware of McGee's pending sex discrimination case when he wrote the letter (App., A-126).

McGee contacted no one else at Upjohn about her sex discrimination case. She neither solicited letters from nor talked about her case to Fred Henry (Tr.201) nor Bernard Shea (App., A-124). In fact Fred Henry knew nothing about McGee's case until Shea told him that John Kallir wanted to meet with them on March 23, 1973 to discuss McGee (Tr. 201). Phyllis Korzilius testified that McGee told her not to tell anyone else at Upjohn about her sex discrimination case against KPR (App., A-156).

McGee's contacts with Upjohn employees were, therefore, limited to soliciting two letters which were to be used as evidence in her pending NYCCHR case and informing one Upjohn employee - Korzilius - that she had filed a charge against KPR. These limited contacts were reasonable in view of her desire to provide the NYCCHR with a description of the duties of a senior account executive and her perceived difficulty in obtaining an accurate description from KPR.

Moreover, these limited contacts had absolutely no prejudicial effect on the business relationship between Upjohn and KPR nor did they threaten to do so. John Kallir admitted that McGee's solicitation of the Korzilius letter and its subsequent use at the March 13 fact-finding conference had no effect on KPR's relationship with Upjohn (App., A-108). Although Kallir feared a potentially adverse effect, he admitted that no one from Upjohn had ever given him cause to believe that KPR's relationship with Upjohn was in jeopardy (App., A-108). Both Bernard Shea (App., A-119, 124) and Fred Henry (Tr. 201), highly placed marketing executives at Upjohn thought that McGee's action in no way jeopardized KPR's relationship with Upjohn. As Henry testified at a pre-trial deposition (Tr. 201).

I didn't see how it (McGee's case), at least up to that point, had affected us or even how it might. I didn't postulate as to how it might and that I felt that our relationship between the company and the agency would continue as it had.

Thus McGee's limited contacts with at most two Upjohn employees contacts established for the sole purpose (protected by \$ 704 (a)) of obtaining evidence in support of her sex discrimination claim pending before the NYCCHR-had no adverse effect, and threatened to have none, on KPR's relationship with Upjohn.

The only argument in support of KPR's position that it was justified in placing McGee on a leave of absence and then terminating her because of her contacts with Upjohn employees is Norman Cooper's theory that any McGee contact with Upjohn that tended to involve the client in an internal agency problem was intolerable to KPR. Cooper testified that he thought that McGee's having contacted a client for any reason dealing with her sex discrimination case was sufficiently prejudicial to KPR's relationship with Upjohn to justify its subsequent actions in placing McGee on a leave of absence and terminating her. Cooper particularly objected to McGee's soliciting letters and transmitting personal problems to the client (App., A-149), but he generally objected to McGee's having involved the client in an "internal problem of the agency" (App., A-151).

The Cooper theory must be rejected. There is no such confidential relationship recognized in the law as an agency-client relationship. (Kallir attempted to draw parallels between the agency-client relationship and the legally recognized attorney-client relationship) (App., A-76).

To accept Cooper's theory would allow an employer against whom Title VII charges have been filed to place unreasonable limits on EEOC or state and local agency investigations when information from third parties becomes vital. Title VII enforcement efforts would be severely frustrated.

In a case where there is absolutely no evidence that McGee was using her Title VII charge as a mere pretext to undermine the business relationship between her employer and her employer's clients, and where there is no evidence that there has been any prejudicial effect on that relationship, the Court must find that McGee was engaging in activities protected by Title VII. The Court must further find that KPR's actions, having been motivated by those protected activities, were in violation of \$ 704 (a).

b. Appellant's citations of authorities are entirely consistent with the holding by Judge Weinfeld

One of the cases cited by KFR support the proposition that an employer may discharge an employee when after the filing of a charge the employee discreetly communicates to a client of the employer some knowledge that she has filed a charge. And more particularly, where the employee communicates this information in connection with her efforts to gather evidence in support of her charge at the request of the local

human rights agency where she had filed the charge.\*

Appellant has cited in its discussion of Point I is a number of cases where an employee in a particular employment setting went beyond the point of prudent behavior by an employee. McGee does not take issue with these cases cited by appellant, and contends that the holdings in these cases are entirely consistent with the holding by Judge Weinfeld in EEOC v. Kallir, Philips, Ross, Inc., supra.

A very clear example of a case where an employee went well beyond the conduct of a reasonably prudent employee provoking her discharge is <u>Hochstadt</u> v. <u>Worcester Foundation</u> for Experimental Biology, 545 F 2d 222 (1st Cir. 1976) heavily relied upon by KPR. See Appellant's Brief at 13, 16, 20, 28. Reliance upon <u>Hochstadt</u> is, however, misplaced.

Ironically, the <u>Hochstadt</u> court cited the approach taken by Judge Weinfeld in <u>EEOC</u> v. <u>Kallir</u>, <u>Philips</u>, <u>Ross</u>, <u>Inc.</u>, 401 F. Supp. 66 (S. D. N. Y. 1975) with approval as being

<sup>\*/</sup> This statement in Appellant's brief (p.16) it further Illustrates its difficulties after conceding that in part its decision to discharge McGe2 was the result of her gathering evidence for her N.Y.C.C...R. cese:

<sup>&</sup>quot;In her zeal to prosecute her case, which by all means she was entitled to do, Ms. MGee overstepped the limits of sound business discretion which would have been expected of anyone in a similar position."

recognized the significant factual differences in the two cases. See <u>Hochstadt</u> v. <u>Worcester Foundation for Experimental</u> Biology, Supra, at 231.

In <u>Hochstadt</u> the plaintiff, a microbiologist, disrupted meetings with personal grievances and salary complaints, circulated untrue rumors that her employer would lose Federal funding, invited a fellow woman scientist to conduct a covert investigation and then later invited a reporter to view confidential salary files, misused secretarial services and photocopy services, made significant errors in a grant application, and made inflammatory remarks to her superiors. A revolt of fellow scientists against plaintiff was brewing as a result of this conduct and other events recided by the <u>Hochstadt</u> court. <u>Id</u> at 227, 228. The court recognized that there is no small difficulty in cases where a business justification is raised by an employer as a defense in a retaliation case:

The standard can be little more definite than the rule of reason applied by a judge or other tribunal to given facts. The requirements of the job and the tolerable limits of conduct in a particular setting must be explored. The present case, therefore, raises the question put simply, of whether the plaintiff went "too far" in her particular employment setting.

<u>Id</u> at 231.

c. McGee was engaged in activities protected by 3 /04 (a)

Section 704 (a)'s protection extends beyond the mere filing of a charge. The statutory language Cited above makes clear that two general types of activity can be characterized as "protected activity": (1) opposition to practices made unlawful by Tilte VII, and (2) making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding or hearing under Title VII. Each of these two types of protected activity merits closer examination within the factual context of this case.

One need not even file a charge of employment discrimination with a government agency in order to oppose unlawful employment practices and receive the protection of \$704 (a). In Johnson v. Lillie Rubin Affiliates, Inc., 5 FEP Cases 547 (M.D. Tenn. March 15, 1972), Judge Gray found that defendant violated \$ 704 (a) by summarily discharging plaintiff after a visit to defendant's plant by a representative of the local chapter of the NAACP to whom plaintiff had complained. See also EEOC Decision No. 72-0661, 4 FEP Cases 440 (December 27, 1971) (reasonable cause found that charging party constructively discharged in violation of \$704 (a) due to complaint to local NAACP office); EEOC Decision No 72-0703, 4 FEP Cases 435 (December 27, 1971) (reasonable cause found that respondent violated \$704 (a) by refusing to here charging party because she questioned respondent at employment interview about respondent's employment of blacks).

Justice Powell, in McDonnel Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973), described the broad scope of \$704 (a) as follows:

(Section 704 (a)) forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment.

Opposition to unlawful employment practices then encompasses many different types of activities (protests, demonstrations, educating fellow employees, filing charges with state agencies, participating in investigations of those charges) that go beyond the mere filing of a charge with the EEOC.

In order to receive the protection of \$704 (a), it should be pointed out, one need only oppose employment practices which one thought to be unlawful, and which aroused one's opposition. That it is not in fact unlawful is irrelevant to the issue of whether or not an employer's response to that opposition was unlawful.

The rationale for this policy is based upon practical experience. Whether or not an employer has actually engaged in unlawful employment practices can be determined only after an investigation by appropriate authorities and, very often, only after a full trial on the merits before an appropriate court. During this period an employee who asserts a Title VII claim against his employer must be protected against retaliatory actions whatever the merits of the asserted claims. As the Fifth Circuit stated in Pettway v. American Cast Iron Pipe Co.,

411 F. 2nd 998, 1005 (5th Cir. 1969):

There can be no doubt about the purpose of \$ 704 (a). In unmistakable language it is to protect the employee who utilizes the tools provided by Congress to protect his rights. The Act will be frustrated if the employer may unilaterally determine the truth or falsity of charges and take independent action.

Following this rationale Courts have correctly separated the question of whether or not an employer has violated \$704 (a) from the question of whether or not the employment practices that gave rise to the employee's complaints were unlawful. See Bradford v. Sloan Paper Co., 383 F. Supp. 1157 (N.D. Ala. 1974); Francis v. American Telephone & Telegraph Co., 55 FRD 202 (D. D.C. 1972); and Johnson v. Lillie Rubin Affiliates, Inc. 5 FEP Cases 547 (M.D. Tenn. March 15, 1972). In order to obtain the protection of \$704 (a) in the instant case, McGee need not prevail on her original NYCCHR sex discrimination charge.

Section 704 (a) explicitly prohibits discrimination against an employee "because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this Title." Because of the nature of the enforcement process of Title VII this language encompasses state and local charges and proceedings as well as those of the EEOC or of the federal courts. (See discussion above). The language then clearly protects from retaliation an employee who files a charge of employment discrimination with the NYCCHR and who later assists and participates in any manner in the investigation of that charge. Clearly \$704 (a) protects

McGee who, in response to a request by the N.Y.C.C.H.R. for any information or evidence in support of her claims, obtained letters from two employees of the Upjohn Company who were familiar with her duties and performance as a KPR senior account executive on the Upjohn account.

In an analagous situation the Milwaukee Police Department, a defendant in a recent Title VII action instituted by the U.S. Justice Department, threatened to bring departmental charges against any employees who communicated with any government attorneys or investigators about their terms and conditions of employment. The Police Department had a rule that prohibited employers from making public any confidential information acquired on the job, and the Department claimed that the rule covered employees' communications concerning Police Department working conditions. Judge Reynolds, however, issued a preliminary injunction enjoining the application of the rule to employee's communications with Justice Department attorneys and investigators on two grounds: (1) that the application of the rule would improperly and illegally interfere with the government's discovery and (2) that the application of the rule would conflict with the intent of \$704 (a) (i.e., that the rule constituted a threat against employees who might participate in a Title VII proceeding), U.S. v. City of Milwaukee, 10 FEP Cases 561 (E.D. Wisc. April 10, 1975).

Action taken against an employee because of that employee's participation in any investigation or proceeding under Title VII is, therefore, a violation of \$704 (a).

#### POINT II

THE FINDING BY THE COURT THAT APPELLANT'S THIRD REASON FOR DISCHARGING MCGEE BASED UPON DISRUPTIVE BEHAVIOR WAS SHEER PRETEXT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

John Kallir testified that the third reason for KPR's decision to place McGee on a leave of absence was because of her unsatisfactory performance at two prostaglandin presentations in early 1973 (App., A-77). An objective evaluation of all the testimony completely supports the District Court finding that KPR's reliance on the prostaglandin presentation as a justification for McGee's leave of absence in merely "sheer pretext" and that "the real reason for her suspension and subsequent discharge was in reprisal because she had filed the sex discrimination charge and engaged in activity protected by the Act". EEOC v. Kallir, Philips, Ross, Inc., Supra, at 73.

The testimony of John Kallir was marked by his inability to separate out in his own mind events which occurred at the two prostaglandin presentation (App., A-95, 96). He did, however, remember receiving negative reports from Bernard Shea about McGee's performance at the first presentation (App., A-77, 95, 96) and he remembers that he was not entirely satisfied with McGee's performance at the second presentation (App., A-95, 96).

Norman Cooper attempted to corroborate Kallir's

that McGee's performance at the presentation was the "the primary thing" in his mind when the Executive Committee decided to place McGee on a leave of absence (App., A-131). However, as has been pointed out, Cooper never once mentioned the prostaglandin presentations as a justification for KPR's actions in his December 13, 1974 affidavit. Furthermore, on cross-examination Cooper admitted that he never once mentioned the prostaglandin presentations as a justification during his pre-trial deposition (Tr. 220-221). Cooper's testimony must, therefore, be ignored as unreliable.

The facts established at trial indicate that there were two prostaglandin presentations at Upjohn's offices in Kalamazoo, Michigan in early 1973. The first took place in early February (Tr. 80). John Kallir was not present. McGee and her supervisor, together with about fifteen Upjohn employees, were present (Tr. 81). The first presentation was in the nature of a rehearsal or dry run for the second, more important presentation before a much larger audience (App., A-72). Apparently McGee's behavior at this first presentation upset Bernard Shea (App., A-118) and he transmitted his displeasure to John Kallir (Tr. 121). Shea told Kallir that McGee had interrupted her superior Jay Lilker and that he (Shea) thought that McGee should have allowed Lilker to proceed (App., A-75).

The second presentation was held in early March (Tr. 80) before a group of fifty Upjohn employees (Tr. 81). It was the formal presentation to Upjohn of KPR's ideas on the marketing of prostaglandins (App., A-56). It was also KPR's first competitive presentation at Upjohn (App., A-57). John Kallir was in attendance and has characterized it as "a very important presentation" (App., A-72).

Although Kallir testified that he was not entirely satisfied with McGee's performance at the second presentation (App., A-78, 80, 81), he admitted that McGee interrupted no one at the second presentation (App., A;99). Kallir claims to have been concerned about McGee's talking over material that had been assigned to other people (App., A-96). Kallir, however, admits to telescoping the two presentations in his mind (App., A-96, 99); therefore, Kallir's recollection of what took place at the second presentation is not entirely reliable.

Bernard Shea of the Upjohn Company was at the second presentation as well as the first. Shea thought the second presentation 'went along in a competent manner (App., A-118). McGee concurs and thought that the second presentation was an excellent presentation (Tr. 81).

Because there is no reliable evidence of any unsatisfactory performance by McGee at the second presentation, attention should be focused upon the first presentation. Upon receiving reports from Shea about McGee's performance at the first presentation, Kallir might have been expected to have

reacted in some manner if he had been genuinely concerned.

Kallir did consider the second presentation a "very important" one (App., A-72). However, he did not discharge McGee or place her on a leave of absence in early February. He did not take her off the Upjohn account. He did not prevent her from going to and participating in the second, formal presentation. He did not even talk to her about her performance at the first presentation (Tr. 82, 177). Kallir, if concerned at all about McGee's performance at the first presentation, was not so concerned that he did not allow McGee to participate in the "competent" second presentation.

If McGee's performance at the first (or even the second) prostaglandin presentation was indeed a factor in KPR's decision to place her on a leave of absence and to terminate her, one would expect this factor to be made known sometime between March, 1973 and June, 1975 especially because there were several opportunities to do so.

Again, McGee was never told by anyone at KPR that her performance at either prostaglandin presentation had been unsatisfactory (Tr. 82, 177).

At the March 13, 1973 NYCCHR fact-finding conference, no mention was made of McGee's unsatisfactory performance at the prostaglandin presentations (Tr. 82 App., A-106) even though her duties and job performance were discussed (Tr. 89-90).

On March 23, 1973 when John Kallir went to Kalamazoo to talk to Fred Henry and Bernard Shea about KPR's decision

to remove McGee from the Upjohn account, Kallir did talk about McGee's sex discrimination charge (App., A-115, 116, Tr. 200-201) but he did not talk about her performance at the prostaglandin presentation. In fact, Shea thought that the reason McGee was taken off the account was "that she in addition to filing this action had become a disruptive influence around the agency" (App., A-117).

On March 27, 1973, the day after McGee was placed on a leave of absence, Kallir told Lillian Morales that KPR's decision was based, not upon McGee's performance at the prostaglandin presentations, but upon McGees' communications with Upjohn employees and KPR women employees (App., A-64). In fact no one at KPR ever mentioned McGee's performance at the presentation to anyone from the NYCCHR (App., A-106)

Norman Cooper admitted under cross-examination that McGee's performance at the prostaglandin presentations was never mentioned as a cause for the discharge at an unemployment compensation hearing (App., A- 133-134). Cooper's December 13, 1974 affidavit makes no mention of the prostaglandin presentations. At his pre-trial deposition, Cooper made no mention of the prostaglandin presentation as a justification for McGee's leave of absence or discharge (App., A- 141)

Having failed to notify McGee of his concern with her unsatisfactory performance at the presentation, having allowed her to participate in the second, formal presentation, having failed to mention the prostaglandin presentations as a factor in McGee's leave of absence and discharge for two years (when there were ample opportunities to do so); John Kallir's testimony at trial on this point lacks credibility. McGee's performance at the prostaglandin presentation played no role in KPR's decision to place McGee on a leave of absence and to terminate her.

Jay Lilker, the senior official of KPR at the February presentation whom McGee allegedly interrupted and criticized did not testify. Judge Weinfeld ruled with respect to this failure on the part of KPR to present his testimony:

As the individual allegedly involved in the incident and an executive officer of responsibility, one would have expected to hear his version of what, if anything, transpired. The failure of the defendant to present his testing permits the inference that his testimony would not have supported the defendant's eleventh hour attempt to present a good faith business justification for its action. (citations omited)

EEOC v. Kallir, Philips, Ross, Inc., supra, at 73.

The finding by Judge Weinfeld that McGee was not discharged for disruptive behavior which was a reason advanced by KPR at trial as a pretext is supported by substantial evidence. An appellate court must very carefully consider the finding of the trial judge who had the benefit of observing the demeanor witnesses and accessing the credibility of the witnesses. A determination must be made by this court that Judge Weinfeld's finding is clearly erroneous. See Gillin v.

Federal Paper Board Co., 079 F. 2d 97, 101 (2d. Cir. 1973);

Garrett v. Mobil Oil Corp., 531 F 2d 892, 895 (8th Cir. 1976);

Fed. R. Cir. P. 52 (a); and see NLRB v. APW Products Co.,

316 F. 2d 899, 903 (2d Cir. 1963); Vanity Fair Paper Mills, Inc.,

v. F.T.C., 311 F. 2d 480, 485-486 (2d Cir. 1962).

## POINT III

A FINDING OF RETALIATORY CONDUCT IN VIOLATION OF \$704 (a) OF THE ACT IS MANDATED AS A RESULT OF APPELLANT'S ADMISSION THAT IT PLACED MCGEE ON A LEAVE OF ABSENCE AND TERMINATED HER BE-CAUSE SHE INFORMED OTHER KPR FEMALE EMPLOYEES OF HER SEX DISCRIMINATION CHARGE

Judge Weinfeld ruled that one of the reasons for KPR's discharge of McGee was "McGee discussing her charge with other female employees". EEOC v. Kallir, Philips, Ross, Inc., supra, at 70, 71.

There is substantial evidence to sustain a finding that McGee's communication with her fellow employees was limited, but that KPR fearing her communications with fellow employees discharged her for activity protected by \$704 (a).

The second reason given by John Kallir to Lillian Morales on March 27, 1973 for placing McGee on a leave of absence the prior day was because McGee allegedly "had discussed the case with other people (App., A-63-64). Who these other people were became clear when John Kallir testified that an additional reason for his March 26 letter (Plaintiff's Exhibit 6) was that other KPR female employees had been informed by McGee of her sex discrimination case (App., A-77, Tr. 140).

Rallir was especially concerned that McGee had urged Pat Jacques, then on the verge of filing her own sex discrimination charge (App., A-77, Tr. 138), to file the charge (Tr. 138). Kallir was also concerned that McGee had discussed her case with

Eileen Moore, Barbara Morano and Caroline White (Tr. 139).

He also testified that he had no concrete information that

McGee had any conversations with female employees of KPR

concerning her sex discrimination case between the day of her

leave of absence and the day of her discharge.

Norman Cooper also admitted that McGee's suspected conversations with female employees of KPR played a role in KPR's decision to place McGee on a leave of absence (App., A-141, 148-149).

KPR's concern about these alleged communications appears to be that they were "devisive (App., A-f) and that they were attempts by McGee to have other women, especially Pat Jacques, file their own charges against KPR (Tr. 177-179).

In fact McGee's communications with KPR women concerning her charge were limited. She admits to informing several people of the fact that she had filed a charge with the NYCCHR: Marie Gerrold, her secretary (in order to let her know who Arnold Loperengthe NYCCHR investigator, was); Barbara Morano and Pat Jaques (in response to questions such as 'What's the matter, Josie?); and possibly Caroline White (Tr. 71). McGee testified, however, that she never "discussed" her case with them in any extended fashion nor urged them to file their own charges (Tr. 72). Eileen Moore testified at a pre-trial deposition that she never knew of McGee's sex discrimination charge until after McGee had been placed on a

leave of absence (Plaintiff's Exhibit II, Tr. 242).

If McGee had in fact attempted to educate women KPR employees of their Title VII rights and had urged these women to file their own charges against KPR or to join her in a class action against KPR, McGee would have been engaging in civil rights activity (opposition to unlawful employment practices) clearly protected by \$704 (a). KPR's actions against McGee, motivated by their mistaken assumption that she was engaging in those types of protected activity, were in violation of \$704 (a). KPR then may not assert that they acted in good faith. See NLRB v. Burnup and Sims, Inc., 379 U.S. 21 (1964) (Defendant's good faith that two employees were planning to dynamite defendant's plant, which was not the case, was an isnsufficient defense to a discharge in violation of \$704 (a) of the NLRA which protects employees engaged in union activity).

Under the law enunciated by this circuit, a finding that at least in part McGee engaged in protected activities, mandates a finding that appellant KPR violated \$704 (a) of the Act. NLRB v. Advanced Business Forms Corp. 474 F. 2d 457, 464 (2d Cir. 1973); NLRB v. Don's Transportation Co., 405 F. 2d 706, 713 (2d Cir. 1969); NLRB v. Pembeck Oil Corp., 404 F. 2d 105, 109-110 (2d Cir. 1968), vacated on other grounds and remanded sub. nom. Atlas Engine Workers, Inc. v. NLRB, 395 U.S. 828 (1969); NLRB v. George V. Roberts & Sons, Inc.

451 F. 2d 941, 945 (2d Cir. 1971); NLRB v. Gladding Keystone
Corp., 435 F. 2d 129, 131-132 (2d Cir. 1970); NLRB v. Milco 388
F. 2d 133, 138 (2d Cir. 1968)

Appellant suggests that the impermissable reason must be the "dominant" cause of the discharge before a violation can be found. See, e.g., NLRB v. Circle Binding, Inc., 536 F. 2d 447, 451 (1st Cir. 1976); NLRB v. Patrick Plaza Dodge, Inc., 522 F. 2d 804, 807 (4th Cir. 1975); Fanet, Inc. v. NLRB 490 F 2d 293, 296 (9th Cir. 1974). However, the District Court found that the discreet solicitation of the Korzilius letter was protected activity and was the major reason leading to her being placed on a leave of absence, and the record supports this conclusion. See EEOC v Kallir, Philips, Ross, Inc., supra, p. 70; and see discussion supra in Point I.

## POINT I

THE AMOUNT AWARDED AS BACK PAY WAS CORRECTLY DETERMINED BY JUDGE WEINFELD EXCEPT TO THE EXTENT THAT NEW YORK STATE UNEMPLOYMENT INSURANCE BENEFITS PAID TO MCGEE WERE DEDUCTED

The matter of damages was referred by Judge

Weinfeld to Magistrate Hartenstine for determination of McGee's

damages including her back pay and other benefits, reduced by

the amount that she reasonably could have earned since her

discharge.\* KPR seized the opportunity to make much of this

language, and, in effect, try its case once again at the

magistrate's hearing. The hearing, longer than the actual

trial, was successful effort by DPR to avoid its judg
ment day. See umage opinion of Judge, Weinfeld, EEOC v.

Kallir, Philips, Ross Inc., Supra at 922.

A. KPR Has Failed To Meet Its Burden Of Proving That McGee's Efforts Were Not Reasonably Diligent.

KPR has attempted to show McGee's lack of reasonable diligence in several ways. Each attempt has been unsuccessful. First, KPR attempted to show that McGee's failure to seek a letter of recommendation from KPR was evidence of lack of diligence (Rtr. 272). However, Robert Lawless testified that a letter of recommendation from a prior employer is not a useful piece of information in evaluating a job candidate

<sup>\*/</sup> Magistrate Hartenstine died in July, 1976 which made necessary an assignment to Magistrate Schreiber by Judge Weinstein to make the written determination based upon the record before Magistrate Hartenstine.

(Rtr. 76). KPR's own witness corroborated this statement.

Stacey Mann testified that her employer, Jerry Fields Associates, never seeks letters of recommendation (Rtr. 330).

Second, KPR attempted to show that McGee did not utilize several available tools while searching for alternative employment. By offering into evidence several job advertisements which ran in the New York Times (Defendant's Exhibit B) and which McGee testified she did not remember seeing (Rtr. 209), KPR has attempted to challenge McGee's diligence in seeking jobs. However, KPR's own witness testified that McGee would not have been hired into any of the jobs advertised by him in the New York Times (Rtr. 395). It should also be noted that the same witness, James Braunworth, testified that he placed several ads for the same job on at least two different occasions (Rtr. 389-391), indicating that the number of ads placed generally exceeds the number of actual jobs available. The quantity of job advertisements, therefore, is no indication of the exact nature of the job market.

KPR succeeded in proving that McGee did not read the classified section in Advertising Age (Rtr. 193). However, James Braunworth admitted that only two or three ads for account management personnel appear in Advertising Age each week (Rtr. 365), that only about half of these are for jobs in New York (Rtr. 411) and that rarely do jobs for ethical account management persons appear (App., A-209). KPR's own witness,

Advertising Age as a job search tool for McGee, and KPR's defense.

KPR established that McGee did not use Standard Rates & Data, allegedly a list of publications in the ethical field (Rtr. 236), nor the agency "Red Book," Defendant's Exhibit E. (Rtr. 366). KPR established that McGee did not obtain a list of PAC members (Rtr. 244, 274). KPR established that McGee did not register with Jerry Fields Associates, an employment agency specializing in the advertising industry (Rtr. 216, 294) and that she did not apply at Allen Kane, a consumer advertising agency (Rtr. 217). KPR failed, however, to introduce any evidence of any job openings to which McGee may have been directed by using Standard Rates & Data, the "Red Book," or a list of PAC members.

KPR failed to produce not only any evidence that Allen Kane would have hired McGee, but also any evidence that there was even an opening into which McGee could have been hired had she applied.

KPR has, therefore, failed to successfully challenge the reasonable diligence of McGee's efforts by failing to demonstrate any other steps which McGee could have taken and which, had she taken them, would have resulted in her finding alternative employment.

6. McGee's Failure To Find Alternative Employment Was Not Due To Lack Of Reasonable Diligence.

It is illogical to conclude that, because McGee's efforts at obtaining alternative employment were unsuccessful, those efforts were not reasonably diligent. There are many factors, other than lack of reasonable diligence, which explain McGee's failure to obtain alternative employment.

First, McGee's health condition - specifically her systemic lupus erythematosus (Rtr. 80) - was responsible for her failure to be considered for at least one of his clients refused to consider McGee for a job as an advertising manager because she could not be eligible for coverage under their medical benefits plan (Rtr. 71). It is unknown just how many other jobs McGee did not receive because her physical condition created problems of uninsurability.

Second, Mc Gee's prospects as an Account Executive in the ethical drug area were decreasing because prospective employers favored applicants with backgrounds unlike McGee's. Mr. Braunworth of William, Douglas, McAdams, the largest ethical drug agency (Rtr. 345), testified that his employer preferred to hire as Account Executives persons with backgrounds in sales, marketing or product management in pharmaceutical companies, as opposed to former secretaries who had worked their way up through the ranks (Rtr. 395-96, 426). He further testified that such a preference was now typical of the entire ethical advertising field and cited Sudler, Hennesey, an agency to which McGee applied (Rtr. 154), as an example (Rtr. 399). In fact, Braunworth testified that he had hired

no one into an Account Executive position between 1973 and 1975 with a secretarial background similar to McGee's (Rtr. 400).

Third, as McGee continued to be unsuccessful in her search for alternative employment, her prospects declined drastically simply because of the passage of time. Braunworth testified that at least part of the reason he was not impressed by McGee was that, at the time he interviewed her, she had been unemployed for eight and one-half months (Rtr. 439).

McGee has now been unemployed for three years. It is difficult to conjure up any explanation of one's idleness for that length of time which would satisfy even the most understanding of prospective employers.

Fourth, although this factor was not dealt with at the hearing, judicial notice may be taken of McGee's age, and inferences can be drawn that as the months and years pass, McGee's employability continues to decrease because of her age.

Finally, it is difficult for one to believe that McGee's difficulties with KPR had absolutely no effect on her prospects for employment. McGee testified that, when asked about the circumstances of her discharge from KPR by prospective employers, she answered honestly and described her sex discrimination charge, her discharge and her pending lawsuit (Rtr. 272). Although Braunworth testified that he did not

consider these facts as having any effect upon his decision not to hire McGee (App. A- 213), it is impossible to know how many prospective employers avoided McGee because of her reputation as a "troublemaker."

One or all of the above reasons operated to reduce McGee's prospects of obtaining alternative employment. These factors, not any lack of reasonable diligence on McGee's part, resulted in her failure to find another job.

# c. McGee's Back Pay Should Not Be Cut Off As Of September

KPR has asserted that McGee's admission that she stopped taking new steps to seek alternative employment in September 1975 - i.e., the date she asked the Court for reinstatement.

However, this cutoff as of September 30, 1975 would not be justified. First, McGee was registered with several employment agencies after September of 1975, and continues to be so registered. There is absolutely no proof whatsoever that McGee removed her name from the active register of these agencies and, therefore, no proof that McGee removed herself from the labor market. McGee remains available for any employment referral which she may receive from the employment agencies with which she is registered. Second, KPR's own witnesses have testified that the labor market for account management personnel in 1975 was not good, Stacey Mann

(Rtr. 301-02) and James Braunworth (Rtr. 386, App., A-208),
"stunk terrible"). Waiting for a judicial ruling upon
McGee's request for reinstatement (App., A- 188), rather than
performing the futile task of more actively looking for
employment in an admittedly hopeless job market, did not
adversely affect her prospects of obtaining alternative
employment. Therefore, reducing McGee's back pay award by
\$16,125 (\$25,800 minus \$9,675 for 1975) on the theory that
McGee voluntarily removed herself from a promising labor market
on September 30, 1975 cannot be justified by the evidence in
this case.

Judge Weinfeld properly ruled that to sustain a deduction after September 30, 1975, KPR must show not only that McGee had failed to exercise due diligence in seeking employment, but also that had she been diligent she might have found employment and had some earnings. See Aparks v. Griffin, 460 F. 2d 433, 443 (5th Cir. 1972); Hegler v. Board of Education, 447 F. 2d 1078, 1081 (8th Cir., 1971); cf. Inda v. United Air Line, Inc., 405 F. Supp. 426, 435 (N.D. Cal. 1975); and see Magistrate's Opinion on Damages, App., A- 226, 227, 228, 229.

d. The Magistrate's Refusal to Examine the Question of Certain Loans Received by McGee During the Period Following Her Discharge Was Proper, Or, Alternatively Said Failure Constitute Harmless Error.

Appellant KPR asserts that the late Magistrate Hartenstine failed to consider the question of whether private loans made to McGee were to be paid back by McGee. In support of its position KPR now urges for the first time that the alleged loans contitute interimearnings for the purpose of \$2000e - 5(g). However, this was not the position of KPR taken at the Magistrate's hearing, and the following exchange illustrates that KPR is raising an issue on appeal which it did not raise in the district court:

Q. Did you receive any loans from individuals who were either friends or relatives of yours?

A. Yes

The Magistrate: Just a minute. I don't understand that. Why is that in the case, Mr. Patterson?

Mr. Patterson (KPR's attorney): Your Honor, again I am asking these questions primarily for the purpose of the credibility of the witness.

(emphasis supplied) (App., A-181)

The contention by appellant KPR that it was denied its sixth amendment right to cross-examination of McGee based upon the ruling of the magistrate is a position utterly without merit. (Appellant's Brief at p. 46). Every question concerning this matter KPR could have asked McGee as the trial (and did not). Having failed to exercise this opportunity to cross-examine McGee at trial concerning receipt of loans it can hardly raise the question of a constitutional violation in

good faith in this Court for the first time.

kpr is incorrect in its basic assumption that a "loan" should be considered as a deduction from a back pay award.

Assuming arguendo that loans were made to McGee with no expectations of repayment, this money would be considered as a gift, and are not deductible from a back pay award. See N.L.R.B. v. Melrose Processing Co., 351 F.2d 693, 701 (8th Cir. 1965). kpr is further in error in citing NLRB v. Nicky Chevrolet Sales, Inc. 493 F2d 103, 108 (7th Cir.), cert. denied, 419 U.S. 834 (1974) (prizes which could have been awarded by employer to employee during the interim period are properly included in the computation of back pay).

e) The Award of Back Pay to McGee For The Period Between The Magistrate's Hearing and the Date of the Judgment Was Proper

The appellant KPR asserts that Judge Weinfeld should have inquired of McGee whether she had worked from the date of the magistrate's hearing to the date of the judgment. Again KPR raises an issue on appeal which it did not bring to the attention of the district court. KPR should be precluded from raising this issue in this Court.

Clearly, there has to be a point where inquiry by the Court must end, and clearly a reasonable point to end the inquiry would be the hearing of the magistrate. Judge Weinfeld commented in his decision that this case was marked by dilatory tactics on the part of the defendant. EEOC v. Kallir, Philips, Ross, Inc., supra, at 922.

The delay between the magistrate's hearing and judgment was, in part, attributable to the tactics employed by KPR. The back pay award properly may take this delay into consideration. cf. Berkshire Employees Assn. of Berkshire Knitting Mills. v. NLRB, 121 F2d 245, 237 (3rd Cir. 1941).

Nor, is this situation analagous to the finding of a non-violation by the trial examiner and a reversal by the NLRB where back pay might be excludable for the interim period. However, the NLRB has been reluctant to grant an exclusion of back pay for this interim period. See NLRB v. APW Products Co., 316 F.2d 899, 905 (2d Cir. 1963) (Abandonment of the tolling principle by the NLRB not an abuse of discretion).

Judge Weinfeld did not abuse his discretion by including a determination of back pay from the hearing date through the date of the judgment.

f) The Award of Back Pay to McGee With Deduction for Payments of New York State Unemployment Insurance Is Error

Judge Weinfeld deducted the sum of \$5,385 received by McGee as unemployment compensation benefits. This deduction fails to consider that under the law of the State of New York, the New York State Unemployment Insurance Board may recoup any moneys received in a back pay award up to the amount of the total unemployment benefits paid. See Mc Kinneys Vol. 30, Labor Law, \$597(3).

McGee may be subjected to a proceeding by the New York State Industrial Commissioner, and risks having to assert then that her back pay award is not controlled by \$597(3), id. This deduction would amount to an unfair double deduction. See NLRB v. Melrose Processing Co., supra at 701. But see Mtr. of Cohen (Levine) 44 A.D. 2d 286, 287 (3rd Dept. 1974).

## POINT V

THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO ORDER REINSTATEMENT OF MC GEE TO HER EMPLOYMENT AS A SENIOR ACCOUNT EXECUTIVE WITH KPR

The court below in fashioning its remedy for Defendant' unlawful conduct denied Plaintiff-Intervenor's request for reinstatement as a senior account executive. In so doing, the Court found that considering the prolonged litigation and the nature of McGee's work, it would be unduly burdensome to require that Defendant reinstate the Plaintiff-Intervenor. E.E.O.C. v. Kallir, Philips, Ross Inc., 420 F. Supp. (S.D.N.Y. 1976) at

It is submitted that the Court committed an abuse of its discretion in refusing to grant reinstatement.

Section 706 (g) of Title VII, in pertinent part, provides as follows:

If the Court finds that the respondent has intentionally engaged in, or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

A section-by-section analysis of the 1972 Amendments to Title VII (The Equal Employment Act of 1972, P.L. 92-261)

v. Moody, supra at 2371. The trial court's discretion must be exercised in light of the purposes of Title VII, and one of the purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination", Ibid. at 2372. In other words:

... The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committeed. <u>Ibid</u>.

In deciding <u>Albemarle</u>, the Supreme Court noted with approval the traditional remedies of the Labor Management Relations Act 29 U.S.C. §141 et seq. for remedying employment discrimination, and held that:

...given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. Ibid. at 2373.

In the context of this case the word "reinstatement" can be substituted for "backpay" because there is no justifiable distinction between a trial court's discretion to award back pay and its discretion to order reinstatement.

The language of Title VII closely parallels that of the Labor Management Relations Act. Under Section 10(c) of the Act the National Labor Relations Board is empowered to issue "an order requiring each persons to cease and desist from such

was prepared by a House-Senate Conference Committee and agreed to by the Committee on February 29, 1972. Analyzing §706 (g), the Conference Committee stated:

The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706 (g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972) cited in Albemarle Paper Co. v. Moody, 95 S. Ct. 2362, 2373, (1975) (Emphasis supplied).

The nature of the trial court's equitable discretion in a Title VII case has been adopted by the Fifth Circuit,

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211

(5th Cir. 1974), and, more importantly, the Supreme Court in Albemarle Paper Co. v. Moody, supra. Although the Albemarle case dealt with a trial court's denial of a back pay award, its reasoning is fully applicable to a reinstatement situation.

The Supreme Court recognized not only that the fashioning of relief in Title VII cases is, by Congressional mandate, within the discretion of the trial court but also that this discretion is not "unfettered by meaningful standards or

unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this Act" 29 U.S.C. §160(c).

Since the inception of the National Labor Board, the Board has remedied employer discrimination with the two fold remedy of back pay and reinstatement. See Chase Manhattan Bank 65 NLRB 827 (1946) (remedies approved by the Supreme Court in Phelps Dodge Corp. v. NLRB, 313 U.S. 117 (1941)).

The <u>Albemarle</u> case is a logical extension of the principles of the National Labor Relations Act that traditional remedies be applied in employment discrimination cases. As the Supreme Court noted, "reinstatement is the conventional correction for discriminationary discharges" <u>Phelps Dodge v. NLRB</u>, 313 U.S. 179 (1941).

According for the court to deny reinstatement, it must "carefully articulate its reasons". Albemarle Paper Co. v. Moody, supra n. 14 at 2373.

Neither the court below, nor KPR has advanced cogent reasons for the denial of the traditional remedies. The court below held that McGee's position as an account executive rendered her ineligible for reinstatement.

The statute makes no distinctions among the types of workers eligible for reinstatement. A search of the legislative history reveals that Congress anticipated no such distinction.

Nor has the case law developed such distinctions. Courts, after

finding Title VII violations of various kinds have ordered the reinstatement of maids, EEOC v. Midas Inc. 8 FEP Cases 719 (D. N. Mex. 1974); clerical workers, Satty v. Nashville Gas Co., 384 F. Supp. 765 (M. D. Tenn. 1974), Reyonlds v. Wise, 375 F. Supp. 145 (N.D. Tex. 1974), Francis v. American Tel. & Tel. Co., 55 FRD 202 (D. D.C. 1972), Doe v. Osteopathic Hospital, 3 FEP Cases 1128 (D. Kan. 1971) and Anderson v. Methodist-Evangelical Hospital, 4 FEP Cases 33 (W. D. Dy, 1971), aff'd 464 F2d 723 (6th Cir. 1972); truck drivers, U.S. v. T.I.M.E.-DC, Inc. 6 FEP Cases 690 (N. D. Tex. 1972); a telephone repairman Daniels v. Pacific Northwest Bell Tel. Co., 7 FEP Cases 1323 (D. Ore. 1972); a helicopter mechanic, Shaffield v. Northrop Aircraft Services, Inc., 373 F. Supp. 937 (N. D. Ala. 1974); railroad firemen, Peters. v. Missouri Pacific R.R. Co., 3 FEP Cases 792 (E.D. Tex. 1971), aff'd 5 FEP Cases 853 (5th Cir. 1973), modified 483 F.2d 490 (5th Cir. 1973), cert. den. 94 S. Ct 356 (1973); an apprentice craft worker, Murray v. American Standards, Inc., 373 F. Supp. 716 (E.D. La. 1973), aff'd 488 F.2d 529 (5th Cir. 1973); a brickmason, Alexander v. Avco Corp., 380 F. Supp. 1282 (M.D. Tenn. 1974), and carpenters, Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969). With no difficulty Courts have also granted reinstatement

to workers other than clericals and laborers. Courts have

ordered the reinstatement of flight attendants Sprogis v. United Air Lines, 308 S. Supp. 959 (N. D. III. 1970); aff'd 444 F.2d 1194 (7th Cir. 1971) and Gerdom v. Continental Air Lines, Inc., 8 FEP Cases 1237 (C.D. Cal. 1964); a claims representative, E.E.O.C. v. Liberty Mutual Insurance Co., 346 F. Supp. 675 (N.D. Ga. 1972), aff'd 475 F.2d 579 (5th Cir. 1973); an insurance company marketing representative, Baxter v. Sharpe, 10 FEP Cases 1159 (W.D. N.C. 1975); various management level employees of a telephone company, Leisner v. N.Y. Telephone Co., 5 FEP Cases 732 (S.D. N.Y. 1973); a college counselor, Moore v. Kibbee, 381 F. Supp. 834 (E.D. N.Y. 1974); a school principal, Smith v. Concordia Parish School Board, 10 FEP Cases 1349 (W.D. La. 1972), aff'd 493 F.2d 8 (5th Cir. 1974), cert. den. 10 FEP Cases 1351 (1975); an A sistant Professor of Biochemistry, Johnson v. University of Pittsburgh, 5 FEP Cases 1182 (W.D. Pa. 1973), and an Assistant Professor of Fine Arts, EEOC v. Tufts Institution of Learning, (D. Mass. C.A. #73-2492-M September 8, 1975). In a case arising under the Fourteenth Amendment concerning the constitutionality of a state law requiring early retirement of State Police, Judge Bailey Aldrich, (sitting as a District Judge in a three-judge proceeding) ordered that the Massachusetts State Police reinstate a man as a Lieutenant Colonel - the second highest ranking officer on the force. See Murgia v. Mass. Board of Retirement, 386 F. Supp. 179 (D. Mass. 1974), aff'd 95 S. Ct. 1972 (1975).

Only in the most exceptional circumstances will the discriminatee be denied reinstatement. The courts have denied reinstatement only in those cases where employees have engaged in extreme violence or have committed unlawful acts against the employers property. Fansteel v. NLRB, 306 U.S. 240 (1939).

The courts have even approved the reinstatement of employees convicted of minor crimes while engaged in protected activities N.L.R.B. v. Elkand Lumber Co., 114 F.2d 221 (3d Cir. 1940) cert. denied 311 U.S. 705.

Under these circumstances reinstatement (plus back pay) is the only practical way of making McGee whole. Defendant has presented no convincing reason to persuade the Court that McGee's presence on KPR's workforce would unduly disrupt its business; and that the reasons given by defendant for not reinstating McGee could not, under the Albemarle standard, justify the Court's refusal to grant full relief to McGee. Defendant continues to do business and continues to employ account executives. Therefore, McGee should be made whole and defendant should be ordered to reinstate McGee, with full back pay and lost benefits.

However, assuming <u>arguendo</u> that the lower court has not abused its discretion in refusing to grant reinstatement, then the only equitable remedy would be the remedy fashioned by Judge Weinfeld below. That is full back pay with one year's front pay

to allow McGee the opportunity to seek other similar employment.

## CONCLUS ION

FOR THE REASON STATED ABOVE, WE RESPECTFULLY SUBMIT THAT THE JUDGMENT OF THE DISTRICT COURT BE AFFIRMED EXCEPT TO THE EXTENT STATED HEREIN, AND THAT THIS COURT SHOULD REMAND TO THIS DISTRICT COURT ONLY FOR THE PURPOSE OF SETTING ATTORNEYS' FEES FOR TRIAL AND APPEAL.

Dated: New York, New York March 21, 1977

Respectfully submitted,

O'DWYER & BERNSTIEN Attorneys for Plaintiff Appellee-Appellant JOSEPHINE McGEE

THOMAS A. HOLMAN BRIAN O'DWYER Of Counsel ADDENDUM

THE OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE HON. EDWARD WEINFELD FILED ON JULY 31, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, and

Josephine McGee, Plaintiff-Intervenor,

V.

KALLIR, PHILIPS, ROSS, INCORPO-BATED, a New York Corporation, Defendant.

Nos. 74 Civ. 3234, 75 Civ. 401.

United States District Court, S. D. New York. July 31, 1975.

Action was commenced on a charge of retaliatory conduct on the part of employer. The District Court, Edward Weinfeld, J., held that evidence served to establish that employer engaged in retaliatory conduct by discharging employee for engaging in activities which were otherwise protected by law, that conduct whereby employee allegedly interrupted her superior at a preliminary presentation of a purported advertising campaign to an executive account serviced by employer could not be used as a basis for justifying discharge where evidence abundantly established that alleged be-

Cite as 401 F. Supp. 66 (1975)

haviour was sheer pretext advanced for first time at trial, and that employee was entitled to a judgment which was to include back pay as well as bonuses, profit sharing and other benefits to which employee would have been entitled had she been continually employed.

Judgment for plaintiff.

#### 1. Civil Rights \$34

An employee need not establish validity of his original complaint to establish a charge of employer retaliation for having made original charge or otherwise engaging in conduct protected by statute. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

### 2. Civil Rights \$\infty 44(1)

Burden of proof was upon employee to sustain her claim of retaliatory conduct against employer by a fair preponderance of credible evidence. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

#### 3. Civil Rights \$\infty 9.10

Provision of Civil Rights Act forbidding discrimination against employees for attempting to protest or correct allegedly discriminatory conditions of employment necessarily protects an employee from retaliation for merely advising fellow employees of their rights under the law. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

#### 4. Civil Rights \$\infty 9.14

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In discharging employee, at least in part because she engaged in protected activities of filing a charge of sex discrimination and of urging an employee to file a similar charge, employer violated provisions of Civil Rights Act forbidding discrimination against employees for attempting to protest or correct allegedly discriminatory conditions of employment. Civil Rights Act of 1964, § 704(a) as amended § 2000e-3(a).

#### 5. Civil Rights =9.10

Conduct of employee in obtaining evidence in support of her sex discrimination charge from an executive account handled by her employer did not justify retaliatory action on part of employer in discharging employee, where employee had been requested by New York City Commission on Human Rights to obtain an objective description of her job, a description which, rightly or wrongly, she felt could not be obtained from employer, and information supplied employee concededly had no effect on employer's client relationship with account. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

#### 6. Civil Rights €9.10

Equal employment provisions of Civil Rights Act contemplate that employees who may feel aggrieved because of alleged discriminatory conduct will initiate and participate in process to vindicate their rights without fear of reprisal. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

#### 7. Civil Rights ⇔9.10

Since enforcement of equal employment provisions of Civil Rights Act is necessarily dependent upon individual complaints, freedom of action by employee presenting grievance to agency must be protected against threat of retaliatory conduct by employers who may resent that they are charged with discrimination. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

#### 8. Civil Rights \$9.10

Rigid enforcement against retaliatory action by employers is required to assure effectiveness of equal employment provisions of Civil Rights Act. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

#### 9. Civil Rights @9.10

Conduct whereby employee, at a preliminary presentation of a proposed advertising campaign to an executive account serviced by employer, allegedly interrupted her superior and was otherwise disruptive was not a basis for justifying employer's retaliatory action in discharging employee, where evidence established that alleged behavior at presentation was a sheer pretext advanced for first time at trial, more than two years after event, and that employer's motive for discharging employee was for activities that were otherwise legally protected. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

#### 10. Civil Rights \$\infty\$46

Employee, who was discharged by employer in retaliation for activities which were otherwise legally protected, was entitled to a judgment against employer, which was to include back pay reduced by amount she earned or reasonably could have earned in other employment since her discharge, as well as bonuses, profit sharing and other benefits to which employee would have been entitled had she been continued in employment. Civil Rights Act of 1964, § 704(a) as amended 42 U.S.C.A. § 2000e-3(a).

William A. Carey, Gen. Counsel, William L. Robinson, Associate Gen. Counsel, Equal Employment Opportunity Commission, Washington, D. C., Delores Wilson, Regional Atty., Dona Kahn, Associate Regional Atty., Paul J. Gontarek, Asst. Regional Atty., Equal Employment Opportunity Commission, Philadelphia Regional Litigation Center, Philadelphia, Pa., Ronald Copeland, Regional Counsel, Equal Employment Opportunity Commission, New York Regional Office, New York City, for plaintiff.

- 42 U.S.C. § 2000e-3(a). The action was instituted pursuant to § 706(f)(1) of the Act, 42 U.S.C. § 2000e-5(f)(1), with jurisdiction grounded on § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3).
- § 706(f)(1), 42 U.S.C. § 2000e-5(f)(1).
   See Fed.R.Civ.P. 24(a)(1). McGee, together with the EEOC, moved for preliminary

O'Dwyer & Bernstein, New York City, for plaintiff-intervenor; Brian O'Dwyer, Thomas A. Holman, New York City, of counsel.

Davis, Gilbert, Levine & Schwartz, New York City, for defendant; Edward S. Patterson, David G. Lehv, New York City, of counsel.

#### OPINION

## FINDINGS OF FACT AND CON-CLUSIONS OF LAW

EDWARD WEINFELD, District Judge.

This action, which had its origin in a charge of sex discrimination in the payment of wages, is now narrowed to a charge of retaliatory conduct.

The action was commenced by the Equal Employment Opportunity Commission ("EEOC") against Kallir, Philips, Ross, Inc. ("KPR"), an advertising agency, charging that it suspended and later discharged Josephine McGee in retaliation for her filing a charge of sex discrimination against KPR and for her opposition to KPR's alleged unlawful employment practices in violation of section 704(a) of Title VII of the Civil Rights Act of 1964, as amended. Josephine McGee (plaintiff) was granted leave to intervene.

#### I

Plaintiff, at the time of her discharge, was employed as a senior account executive by defendant, which numbered among its clients The Upjohn Company, a pharmaceutical house. She first entered defendant's employ in 1967 as an administrative assistant and from time to time was promoted to positions of increased responsibility with commensu-

injunctive relief. Because the central issue presented a question of fact as to the defendant's motivation in discharging McGee, the court concluded it could not grant preliminary relief on the basis of the conflicting affidavits before it and consolidated the hearing on the application for preliminary relief with an advanced trial on the merits, Fed.R.Civ.P. 65(a)(2).

Cite as 401 F.Supp. 66 (1975)

rate salary increases. In December 1972, she was assigned to the Upjohn account under Jay Lilker, a senior vice president of defendant, who was the account supervisor, and John Kallir, president and principal stockholder of KPR, who was the management representative on the account.

Plaintiff, whose annual salary then was £18,000, learned that a male senior account executive was paid \$25,000. On December 4th, she requested of Kallir that her salary be brought into parity with that of her male counterpart. Kallir advised plaintiff that the matter would be considered by defendant's executive committee in April 1973, prior to the sixth anniversary of her employment. Dissatisfied with the lack of immediate favorable action, plaintiff filed a charge of sex discrimination with the New York City Commission on Human Rights ("NYCCHR")3 against KPR based upon the salary differential. In connection with its investigation of the charges. NYCCHR requested an objective job description of plaintiff's position which, rightly or wrongly, she felt could not be obtained from the defendant. Plaintiff thereupon obtained from Phyllis Korzilius, the product manager at Upjohn Company who worked with plaintiff, a letter containing the necessary information.

On March 13, 1973, in accordance with NYCCHR procedure, a fact finding conference was held relative to McGee's claim, attended by Commission representatives, plaintiff, Kallir and other representatives of defendant, including its attorncy. In response to Kallir's statement during the course of the conference as to the scope of plaintiff's activities, a Commission supervisor produced the Korzilius letter. The KPR representatives reacted with displeasure, to say the least; that they resented that plaintiff had contacted its client to ob-

tain the letter admits of no dispute. From the time plaintiff first brought up the subject of alleged discrimination in salary on December 4th, followed by the filing of her complaint and up to her suspension, no KPR official expressed any displeasure because of her charge, or indicated that any action would be taken against her. She continued to perform her usual duties.

On March 26th, Kallir, without any discussion, handed plaintiff a letter which informed her that she was suspended from her duties but that her salary would continue. The stated reason for this action was:

"The protracted nature of our adjourned hearing before the Human Rights Commission; the course you've chosen to follow by involving various individuals, both on the agency's staff and at Upjohn; and your divisive behavior make it increasingly difficult for us to carry on our normal day-to-day activities and provide our client with the service they [sic] require."

The following day defendant circulated among its employees a memorandum which, among other matters, stated that it had granted a leave of absence at full pay to plaintiff; that while procedures dragged on at the NYCCHR, defendant saw "no reason at first why they should interfere with [plaintiff's] role in the agency. Increasingly, though, [plaintiff] has taken actions which could prove detrimental to our relationship with Upjohn. The agency-client relationship is so sensitive and dependent on complete mutual trust that we cannot allow it to be undermined through divisiveness or personal rancor. Thus, she left us no choice but to act as we did." Plaintiff perforce accepted the situation. She promptly notified the NYCCHR of her suspension and upon its request signed a new complaint on March 27th, charging the defendant with retaliatory

 <sup>§ 706(</sup>c) of the Act, 42 U.S.C. § 2000e— 5(c), requires individuals to resort to available state or local remedies for at least 60 days before filing a charge with the EEOC.

N.Y. Executive Law § 297(3) (McKinney's Consol.Laws, c. 18, 1972).

action. On April 23, she filed a similar charge with the EEOC.5

Plaintiff was continued on leave of absence with pay until May 15, 1973, when defendant tersely wrote to her: "In view of the circumstances, we have decided to discontinue your checks." The "circumstances" were not stated. There had been no communication between plaintiff and defendant from March 26, when she was put on leave, to May 15th, when she was notified she would no longer be paid.

#### H

[1, 2] The issue, as noted at the outset, is whether the defendant suspended and later discharged plaintiff in retaliation against her for filing sex discrimination charges with the NYCCHR. Thus the merits of plaintiff's charge of sex discrimination are not before the court.6 Plaintiff contends she was discharged by defendant in retaliation for her having filed the sex discrimination charge and for assisting the NYCCHR in investigating this charge.7 The defendant denies that it was so motivated and contends that its action was a legitimate response (1) to plaintiff's conduct in involving the agency's client, Upjohn, in her charge by soliciting evidence from its employees, and (2) her disruptive actions at a preliminary presentation by the agency to Upjohn in early

- 5. On September 24, 1973, the EEOC determined that there was reasonable cause to believe that the charge of retaliatory discharge was true; it also determined that there was insufficient evidence to resolve plaintiff's original charge of discriminatory conduct with respect to terms and conditions of employment. Efforts to resolve the controversy by conciliation failed, following which this action was commenced.
- 6. An employee need not establish the validity of his original claim to establish a charge of employer retaliation for having made the original charge or otherwise engaging in conduct protected by § 704(a). Pettray v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969); Bradford v. Sloan Paper Co., 383 F.Supp. 1157 (N.D.Ala.1974); Francis v. American Tel. & Tel. Co., 55 F. R.D. 202 (D.D.C.1972).

February 1973. The burden of proof is upon the plaintiff to sustain her claim by a fair preponderance of the credible evidence. Upon the entire evidence, including the demeanor of witnesses who testified at the trial, I find that plaintiff has sustained her burden of proof.

#### III

### A

[3,4] Originally, one of the reasons assigned by defendant in justification for plaintiff's discharge was that she had filed a charge of sex discrimination, and, in one instance, allegedly had urged an employee to file a similar charge. Defendant now concedes that absent disruptive conduct, of which there was no proof, plaintiff was within her legal rights in informing her co-workers that she had filed a claim of discrimination against defendant and that they had a right to do likewise. The defendant, as to this phase of its defense, now recognizes it "could not . . . base its decision to discipline plaintiff because of this activity." 9 However, despite this belated acknowledgment, the evidence requires a finding that one of the reasons for defendant's conduct was McGee's discussing her charge with other female employees. Section 704(a) of Title VII forbids "discrimination against . . employees for attempting to protest or correct allegedly discriminato-

7. § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees... because [an employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

- McDonnell Douglas Coep. v. Green, 411 U., 8, 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973);
   Christian v. General Motors Corp., 341 F. Supp. 1207, 1208 (E.D.Mo.1972), aff'd without opinion, 475 F.2d 1407 (8th Cir. 1973).
- 9. Defendant's Post Trial Brief p. 21.

# EQUAL EMP. OP. COM'N v. KALLIR, PHILIPS, ROSS, INC.

Cite as 401 F. Supp. 66 (1975)

ry conditions of employment," 10 and it necessarily protects an employee from retaliation for merely advising fellow employees of their rights under the law. In discharging plaintiff, at least in part because she engaged in these protected artivities, defendant violated the statute.

B

The defendant claims that its action was justified based upon plaintiff's conduct concerning the Upjohn account. Here defendant cites two incidents, her conduct (1) in obtaining the letter from Korzilius, Upjohn's product manager, and (2) at the presentation of an advertising program to Upjohn in early February when it is claimed she engaged in disruptive behavior which imperilled retention of that account.

disposed of as lacking in substance. The defendant contends that it properly discharged plaintiff because she requested the assistance of Upjohn employees in obtaining evidence in support of her charge and sought to involve them in her controversy so that Upjohn would apply some pressure on her behalf. The defendant asserts that this was the primary cause for its action. Plaintiff had been requested by the NYCCHR to obtain an objective description of her job. There was nothing wrong or disruptive

for plaintiff to request and obtain the letter from Korzilius, the Upjohn representative with whom she worked and who was familiar with her functions. Plaintiff's actions were circumspect; indeed, when plaintiff informed Korzilius that she had filed charges she asked Korzilius to keep it confidential. While the letter may have been an abrasive factor in the relationship between defendant and plaintiff, the defendant concedes that it had no effect on the client relationship.

Section 704(a) also prohibits employer retaliation because an employee assists or participates in any manner in an investigation under Title VII.<sup>12</sup> Defendant's violent reaction upon the production of the Korzilius letter at the March 13 NYCCHR fact finding conference, followed closely thereafter by its decision to suspend plaintiff, reveal that the solicitation of the letter was so strongly resented that it was a substantial cause of plaintiff's suspension.

Under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his charge may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer that the employee loses the protection of section 704(a), just as other legitimate civil rights activities lose the protection of

- McDonnell Douglas Corp. v. Green, 411
   U.S. 792, 796, 93 S.Ct. 1817, 1821, 36 L.Ed.
   2d 668 (1973).
- 11. Other than the request to Korzilius, Mc-Gee solicited no other letters from Upjohn employees. The only other occasion when McGee involved an Upjohn employee was when she asked James Penrose if she could use in connection with her charge an unsolicited letter from him complimenting her job performance.
- 12. KPR argues that § 704(a) does not apply to its conduct because the statute only protects the activity of individuals connected with "an investigation, proceeding, or hearing under this subchapter. [Title VII]." (emphasis supplied) Claiming that only EEOC investigations are investigations "under this subchapter," it contends that while it was aware of plaintiff's pending charge

before the NYCCHR, since it was not notified that she had filed a charge with the EEOC until after it had discharged her on May 15, 1973, it could not have been retaliating against her for assisting in investigations, etc., "under this subchapter." The argument is frivolous. Resort to the NYCCHR was required in this instance by \$ 706(c) of Title VII. Moreover, the statute provides protection for those who oppose any practice made an unlawful employment practice by this subchapter" and clearly McGee's filing a complaint with the NYCCHR and cooperating with its investigation is covered by this language. It is not necessary to file a complaint with the EEOC before § 704(a)'s protection from retaliatory conduct becomes applicable. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

section 704(a) when they progress to the point of deliberate and unlawful conduct against the employer.13 But this is not such a case. The defendant concedes that the information sought by plaintiff from Korzilius was relevant to her claim and that she had a legitimate purpose of obtaining it. Plaintiff's statutory right to engage in the protected activity of assisting and participating in the investigation of her charge against defendant would be without substance if defendant could justify her discharge based upon her discreet solicitation of a letter setting forth the nature of her work because of its excessive squeamishness about relations with a client.

[6-8] Section 704(a) is to be broadly construed to protect the rights of employees under Title VII.14 The Act contemplates that employees who may feel aggrieved because of alleged discriminatory conduct will initiate and participate in the process to vindicate their rights without fear of reprisal. Since the enforcement of Title VII rights is necessarily dependent on individual complaints, freedom of action by employees presenting grievances to agencies must be protected against the threat of retaliatory conduct by employers who may resent that they are charged with discrimination.15 Rigid enforcement against retaliatory action is required to assure the effectiveness of the Act. Defendant violated the Act when it susthe NYCCHR, which caused no discernible effect on the agency's relationship with Upjohn. The defendant's claim that retention of good rapport with its client required that plaintiff be taken off the account is belied by the record. The fact is that nothing plaintiff said or did in any way affected the relationship between defendant and Upjohn. In addition to the evidence that plaintiff's conduct had no effect on that relationship, Kallir testified that Upjohn's product manager told him several times he was sorry plaintiff had been taken off the account.

pended and discharged plaintiff for her

legally protected activity, requested by

[9] Thus the issue narrows down to defendant's second claim that it suspended plaintiff because of her conduct in early February 1973 at a preliminary presentation of a proposed advertising campaign to Upjohn when she allegedly interrupted her superior and was otherwise disruptive. Defendant, of course, had the right to discharge plaintiff in the event of inadequate job performance or for failure to follow orders at a presentation to a client.16 However, the evidence abundantly establishes that the purported justification for defendant's discharge-plaintiff's alleged behavior at the February 1973 presentation—was sheer pretext advanced for the first time at the trial, more than two years after the event.17

- McDonnell Douglas Corp. v. Green, 411
   U.S. 792, 803, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).
- Petticay v. American Cast Iron Pipe Co.,
   411 F.2d 998, 1005-07 (5th Cir. 1969);
   Held v. Missouri Pac. R.R., 373 F.Supp. 996,
   1004 (S.D.Tex.1974); vf. NLRB v. Scrivener, 405 U.S. 117, 92 S.Ct. 798, 31 L.Ed.2d
   79 (1972).
- Petticay v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969).
- See Gillin v. Federal Paper Board Co., 479 F.2d 97, 101 (2d Cir. 1973); Bradington v. IBM Corp., 360 F.Supp. 845, 853-55 (D. Md.1973), aff'd without opinion, 492 F.2d 1240 (4th Cir. 1974); McFadden v. Baltimore S.S. Trade Assoc., 352 F.Supp. 403, 411-12 (D.Md.1973), aff'd 483 F.2d 452 (4th Cir. 1973); Barnes v. Lerner Shops of Tex-

- as, Inc., 323 F.Supp. 617, 622 (S.D.Tex. 1971).
- 17. Even if defendant was in part motivated by this incident, the court's finding that its decision was also motivated by unlawful factors makes the suspension illegal. NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941, 945 (2d Cir. 1971); Smith v. Sot D. Adler Realty Co., 436 F.2d 344, 340-50 (7th Cir. 1970); NLRB v. Gladding Keystone Corp., 435 F.2d 129, 131-32 (2d Cir. 1970); NLRB v. Milco, Inc., 388 F.2d 133, 138 (2d Cir. 1968); NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (2d Cir. 1965); NLRB r. Great Eastern Color Lithographic Corp., 309 F.2d 352, 355 (2d Cir. 1962), cert. denied, 373 U.S. 950, 83 S. Cr. 1680, 10 L.Ed.2d 705 (1963); NLRB v. Jamestown Sterling Corp., 211 F.2d 725, 726 (2d Cir. 1954).

# EQUAL EMP. OP. COM'N v. KALLIR, PHILIPS, ROSS, INC.

Cite as 401 F.Supp. 66 (1975)

After plaintiff made her demand for pay parity early in December 1972, she continued to service the Upjohn account. Her qualifications and expertise to perform her functions are not in dispute. In February 1973, together with Lilker, her superior in charge of the account, plaintiff participated in presenting before a group of Upjohn executives a proposed advertising and marketing campaign for one of Upjohn's products. The defendant asserts that she interfered with the presentation by interrupting and improperly criticizing Lilker in the presence of the Upjohn representatives; that since the presentation is the end product of the combined effort of defendant's staff and intended to gain the client's acceptance of the program, a united front is required; and that plaintiff's behavior was detrimental to defendant's interest and "could if left to continue seriously affect [its] relationship with Upjohn."

Despite this charge of unseemly conduct at the preliminary February presentation, defendant required that plaintiff participate in the second and final presentation which took place in early March. It is conceded that on this occasion no untoward incident occurred and that the presentation was made in a competent manner. If, as defendant now asserts, plaintiff's alleged obstructive conduct at the February meeting was the reason for her suspension, one is moved to inquire why action had not

been taken at that time and why plaintiff was called upon to continue her duties in March at the second presentation.

Significantly, the March 13, 1973 NYCCHR fact finding conference took place soon after the March presentation. Yet no mention was made of the February presentation. Other facts indicate beyond peradventure that defendant's reliance on the February presentation is sheer afterthought. Kallir's letter of March 26th relieving plaintiff of her duties makes no mention of the February presentation, nor does his memorandum of March 27th to the staff of the agen-Neither Kallir nor Lilker ever talked to plaintiff about her conduct at that presentation. Immediately after plaintiff's suspension with pay, a representative of the NYCCHR asked Kallir about his action; yet he never mentioned the February presentation.

[10] And of even greater significance is the fact that Lilker, the senior KPR official at the February presentation whom plaintiff allegedly interrupted and criticized, did not testify. As the individual allegedly involved in the incident and an executive officer of responsibility, one would have expected to hear his version of what, if anything, transpired. The failure of the defendant to present his testimony permits the inference that his testimony would not have supported the defendant's eleventh hour attempt to present a good faith business justification for its action. 18

289 (3d ed. 1940); McCormick, Evidence § 249 (1954). See also United States v. Blakemore, 489 F.2d 193, 195 (6th Cir. 1973); United States v. Noah, 475 F.2d 688, 691 (9th Cir.), cert. denied, 414 U.S. 821, 94 S.Ct. 119, 38 L.Ed.2d 54 (1973); United States v. Evanchik, 413 F.2d 950, 953 (2d Cir. 1969); United States v. Dibrizzi, 393 F.2d 642, 646 (2d Cir. 1968); United States v. Llamas, 280 F.2d 392, 393-94 (2d Cir. 1960); United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946); United States v. Dolinger, 384 F.Supp. 682, 687 (S.D.N.Y.

<sup>18.</sup> Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226, 59 S.Ct. 467, 83 L.Ed. 610 (1939); Local I.B.T. v. United States, 291 U.S. 293, 297, 54 S.Ct. 396, 78 L.Ed. 804 (1934); Bass v. Hutchins, 417 F.2d 692, 698 (5th Cir. 1969); San Antonio v. Timko, 368 F.2d 983, 985 (2d Cir. 1966); N. Sims Organ & Co. v. SEC, 293 F.2d 78, 80-81 (2d Cir. 1961), cert. denied, 368 U.S. 968, 82 S. Ct. 440, 7 L.Ed.2d 396 (1962); Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944); SEC v. Kelly, Andrews & Bradley, Inc., 341 F.Supp. 1201, 1205 (S.D.N.Y.1972); Wigmore, Evidence §

The objective facts require rejection of defendant's contention that one of the reasons for suspending plaintiff was her conduct at the February preliminary presentation; they compel the conclusion that the real reason for her suspension and subsequent discharge was in reprisal because she had filed the sex discrimination charge and engaged in activity protected by the Act. The court finds that defendant's acts were in violation of section 704(a) of Title VII and that plaintiff and the EEOC are entitled to judgment, which shall include back pay to plaintiff,19 reduced by the amount she earned or reasonably could have earned in other employment since her discharge.20 The award shall also include bonuses, profit sharing and other benefits to which plaintiff would have been entitled had she been continued in her employment. Consistent with the statutory policy of encouraging individuals to protect Title VII rights, plaintiff's counsel will be allowed reasonable attorney's fees upon proper application to the court.21

The foregoing, together with the parties' stipulation of facts, shall constitute the Court's Findings of Fact and Conclusions of Law.

Submit order in accordance with the foregoing.

1974); United States v. Kulp, 365 F.Supp. 747, 766 (E.D.Pa.1973); United States v. Pawlak, 352 F.Supp. 794, 798 (S.D.N.Y. 1972).

19. Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); "[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."

20. See § 706(g), 42 U.S.C. § 2000e-5(g).

§ 706(k), 42 U.S.C. § 2000e-5(k). Albernarle Paper Co. v. Moody, 422 U.S. 405, 95

S.Cr. 2362, 45 L.Ed.2d 280 (1975); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), cert. denied, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973); United States v. Georgia Power Co., 474 F.2d 906, 927 (5th Cir. 1973): Schaeffer v. San Diego Yellow Cabs. Inc., 462 F.2d 1002, 1008 (9th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348, 360 n.26 (5th Cir. 1972); Brown v. Gaston County Dyeing Mach. Co., 457 F. 2d 1377, 1383 (4th Cir.), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.24 246 (1972). See Northeross v. Board of Educ., 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).

UNITED STATES COURT OF APPEALS SECOND CIRCUIT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. Plaintiff, and JOSEPHINE MCGEE Plaintiff-Intervenor-Appellee-AFF IDAV IT Appellant, Docket No. 76-6191 -against-KALLIR, PHILIPS, ROSS, INCORPORATED, Defendant-Appellant-Appellee. STATE OF NEW YORK SS .: COUNTY OF NEW YORK) JOHN O'CONNOR, being duly sworn, deposes and says: Deponent is not a party to the action, is over 18 years of age and resides at Pearl River, New York. On March 21, 1977 deponent served the Brief of Plaintiff-Intervenor-Appellee-Appellant in this action upon PHILIPS & MUSHKIN, P.C., attorneys for Defendant-Appellant-Appellee in this action, at 360 Lexington Avenue, New York, N.Y., and upon EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, attorneys for Plaintiff in this action, at 2401 E Street, N.W., Washington, D.C., the addresses designated by said attorneys for that purpose by depositing two (2) true copies to each of same enclosed in post-paid properly addressed wrappers, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York. Sworn to before me this 21 st day of March, 1977. Elen Colema Natury Public, State of New York No. 03 - 5757265 Commis . in Expires March 30, 1978

S	TATE	OF NEV	V YORK, COUNTY OF		65.:		
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		Attorney's					
Check Applicable			the attorney(s) of record in the within action; deponent has read the foregoner and knows the contents thereof; the same and that as to those matters deponent believes it to be true. This verification is made by deponent and not by				
			The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:				
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#### NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on

Dated.

Yours, etc.,
O'DWYER & BERNSTIEN

Attorneys for

Office and Post Office Address, Telephone

63 Wall Street New York, N. Y. 10005 Telephone BO 9-3939

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the

day of

19

at

M.

Dated,

Yours, etc.,

O'DWYER & BERNSTIEN

Attorneys for

Office and Post Office Address, Telephone

63 Wall Street New York, N. Y. 10005 Telephone BO 9-3939

То

Attorney(s) for

UNITED STATES COURT OF APPEALS SECOND CIRCUIT
Docket # 76-6191

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. Plaintiff. and JOSEPHINE MCGEE Plaintiff-Intervenor-Appellee-Appellant. -against-KALLIR, PHILIPS, ROSS, INCORPORATED, Defendant-Appellant-Appellee. AFFINAVIT OF SERVICE O'DWYER & BERNSTIEN Attorneys for Office and Post Office Address, Telephone New York, N. Y. 10005 63 Wall Street Telephone BO 9-3939 To Attorney(s) for Service of a copy of the within is hereby admitted. Dated,

1500-@1973, JULIUS BLUMBERG, INC., 80 EXCHANGE PLACE, N.Y. 10004

Attorney(s) for